

Quarterly Report
OF THE
ATTORNEY GENERAL
OF
ALABAMA



FOR THE PERIOD
FROM APRIL 1, 1972
THROUGH JUNE 1, 1972

WILLIAM J. BAXLEY, Attorney General

VOLUME 147

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Q U A R T E R L Y R E P O R T

of the

ATTORNEY GENERAL

of

A L A B A M A

For the Period

From April 1, 1972

Through June 30, 1972

**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF
ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from April 1, 1972, through June 30, 1972, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State, and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

WILLIAM J. BAXLEY

Attorney General

WILLIAM J. BAXLEY
Attorney General

GEORGE L. BECK
Deputy Attorney General

E. RAY ACTON
Executive Assistant

WALTER S. TURNER
Chief Assistant Attorney
General

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Robert L. Humphries

OPINIONS

April 4, 1972

Honorable E. Mark Ezell
Judge of Probate
Choctaw County
Court House
Butler, Alabama 36904

Voters — Assistance to Illiterate Voters.

Illiterate voters can have the assistance of any person they choose in casting their ballots and a single individual can legally assist more than one illiterate voter during the same election if chosen by more than one such voter.

Opinion by Assistant Attorney General Yung.

Dear Judge Ezell:

Reference is made to your letter of March 31, 1972, wherein you request an opinion of this office which is as follows:

"In the past, several questions have arisen concerning assistance to illiterate voters during elections. Mr. Herbert Nation, a person whom I consider an expert on election laws, says that a person, poll official or otherwise, may assist more than one illiterate voter during an election so long as said person is voluntarily chosen. Another source indicates that a person can only assist one illiterate voter during an election. Personally, it does not matter to me which method is used, however, we do want to eliminate any confusion and conduct uniform, fair and honest elections.

"Accordingly, we would certainly appreciate your official opinion on the following questions: Whether or not a voter in Alabama, who is illiterate or cannot read or write or for some reason does not understand the ballot, can have assistance inside the voting booth from any person that the voter may voluntarily choose, even though such person chosen by the voter may have previously assisted other such voters during the same election, i.e., if a person assists one such voter, is he barred from helping other such voters? Does the person rendering such service have to be a poll official?"

The answer to your first question is in the affirmative and the answer to your second question is in the negative.

The pertinent Code provision of general elections is Title 17, Section 176, Code of Alabama 1940, Recompiled 1958, which provides that illiterate voters may have the assistance of "any person he may select" in casting his ballot.

The pertinent Code provision for primary elections is Title 17, Section 359, and although this section provides that illiterate

voters may be assisted in voting only by "two inspectors," it is the opinion of this office that this provision has been overridden by the Voting Rights Act of 1965 as the same has been judicially interpreted.

In **United States v. Executive Committee of the Democratic Party of Greene County, Alabama**, 254 F. Supp. 543, at Page 547, the United States District Court for the Northern District of Alabama stated:

"It is true that Title 17, Sec. 359, Code of Alabama states that no more than two people can be present during this voting procedure. However, certain state regulatory authority has been supplanted by the Fifteenth Amendment. The Supremacy Clause of the United States Constitution requires that this procedure of Alabama law give way to enforcement of the Voting Rights Act of 1965."

It is, therefore, the opinion of this office that illiterate voters, in both general and primary elections, may now have assistance in casting their ballot from any person they may voluntarily select, even though the person chosen to render assistance may have previously assisted other illiterate voters during the same election. The initiative must come from the illiterate voter in seeking assistance, and his choice of the person to assist him must be completely voluntary.

Sincerely,

WILLIAM J. BAXLEY
Attorney General

April 18, 1972

Honorable Bernard A. Reynolds
Judge of Probate
Dallas County Courthouse
Selma, Alabama 36701

Filing Tax — Judges of Probate — Taxation — Uniform
Commercial Code.

Effect of giving notice of extension of time for payment of debt within purview of Title 51, Section 619(f), Code of Alabama 1940, Recompiled 1958, upon notice filing provisions of the UCC, discussed generally.

Opinion by Assistant Attorneys General Davis and Loeb.

Dear Judge Reynolds:

Reference is made to your letter of October 19, 1971, and subsequent letters in which you ask for an opinion from this office as follows:

"When this bank files a financing statement in a Probate Office in Alabama and pays the filing fee and registration tax as required by law and subsequently files a continuation statement, to preserve its lien under the financing statement, is the bank liable only for the filing fee of \$2.00, or is it also liable for a registration tax on the unpaid balance secured by its financing statement?"

Your question has to do with the application of the mortgage filing tax levied under Title 51, Section 619(f), Code of Alabama 1940, Recompiled 1958, to a continuation statement filed in accordance with the Uniform Commercial Code, Title 7A, Section 9-403(3).

Title 51, Section 619(f), *supra*, reads as follows:

"(f) When the time for the payment of the indebtedness secured by, or the securing of which is evidenced by, any such instrument is extended or renewed, and the extension or renewal contract is offered for filing or for record, the tax required in this section shall be paid on the amount of indebtedness so extended or renewed; and the same shall be governed in all respects by the provisions of this article. No state, county or municipal ad valorem tax shall be payable on any such instrument upon which the tax prescribed by this section shall have been paid, or on the debt secured or evidenced thereby, or on the security agreement evidenced thereby."

It is necessary to read the filing sections of the UCC, specifically Sections 9-402 and 9-403 in *pari materia* with Title 51, Section 619, and, specifically, Subsection (f) thereof, because these two laws have bearing upon the same subject, to wit, the filing for record of commercial instruments which give notice of a security interest in chattels.

Prior to the UCC, the recordation of the extension or renewal agreement was a prerequisite to the tax being due; now, after passage of the UCC, extensions can also be effected by either continuation statements or amendments (depending upon circumstances). Regrettably, Section 619(f), *supra*, was not amended after adoption of the UCC to expressly cover an extension effected by either of these two documents. Therefore, in order for Section 619(f) to have a present field of operation under the UCC, the words "and the extension or renewal contract is offered for filing or for record" must be read so as to include any document effecting such extension and provided for under the UCC.

Section 619, *supra*, provides for a tax, measured by the indebtedness recited, upon the privilege of filing a notice document, which filing gives the secured party a priority position, as opposed to certain third parties, such as junior secured creditors and unsecured creditors. Although, prior to an actual extension agreement, such notice filing may

have been perfected and/or maintained under the UCC, it is the actual extension of time for payment of all or part of an indebtedness which gives rise to the tax levied by Section 619(f), supra. Such tax is measured by the amount of indebtedness so extended.

In view of the preceding discussion, it is obvious that mortgage tax under Section 619(f) can be incurred in other ways than by the filing of a continuation statement (i.e., by amendment on UCC-3 and by presentation for record of the extension agreement itself). Thus, the tax is not necessarily due upon the filing of a continuation statement, but is sometimes due depending on the circumstances. In addition, it should be noted that the tax is always due when an amendment (UCC-3) extending the time for payment or the extension agreement itself is offered for record.

The next logical question is: What are the "circumstances" under which continuation statements or other documents are subject to the mortgage filing tax? The provisions of the UCC which are pertinent to the discussion of these circumstances are the following:

"§9-403. . . .

"(2) A filed financing statement which states a maturity date of the obligation secured of five years or less is effective until such maturity date and thereafter for a period of sixty days. Any other filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of such sixty day period after a stated maturity date or on the expiration of such five year period, as the case may be, unless a continuation statement is filed prior to the lapse. Upon such lapse the security interest becomes unperfected. A filed financing statement which states that the obligation secured is payable on demand is effective for five years from the date of filing.

"(3) A continuation statement may be filed by the secured party (i) within six months before and sixty days after a stated maturity date of five years or less, and (ii) otherwise within six months prior to the expiration of the five year period specified in subsection (2). Any such continuation statement must be signed by the secured party, identify the original statement by file number and state that the original statement is still effective. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in subsection (2) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed

in the same manner to continue the effectiveness of the original statement. . . .

* * *

“(5) The uniform fee for filing, indexing and furnishing filing data for an original or a continuation statement shall be \$2.00.”

Of course, the presentation for record of the extension agreement itself gives rise to the tax under Section 619(f) just as it always did.

A continuation statement gives rise to the tax under Section 619(f) when the date of maturity shown in Box 3 of the UCC-1 is five years or less, or not stated, and the date of the maturity shown on the face of the security agreement corresponds to the date shown in Box 3 or falls within the period allowed for filing of a continuation statement under Title 7A, Section 9-403(3). The tax levied by Section 619(f), *supra*, should be paid to you upon presentation for record of a continuation statement under the above circumstances and is measured by the amount of indebtedness so extended.

When the date of maturity as shown in Box 3 of the UCC-1 is stated to be five years, or is not stated, and the date of maturity shown on the face of the security agreement is a date less than five years and not within the time allowed for filing of a continuation statement under Title 7A, Section 9-403(3), *supra* (in other words, any date within four and one-half years of the date of filing of the financing statement), an amendment meeting the requirements of Title 7A, Section 9-402(4) must be filed. This amendment should be made on a UCC-3 and should set forth the original date of maturity shown on the security agreement, and the date to which payment of the indebtedness has been extended. Upon presentation of such amendment to you for recordation, the tax levied by Section 619(f), must be paid upon the entire amount of indebtedness extended as of the date the extension agreement was entered into between the parties.

When the date of maturity shown in Box 3 of UCC-1 is stated to be five years or is not stated, and the date of maturity shown on the face of the security agreement is a date more than five years after the date of filing of the financing statement, a continuation statement may be filed within the time allowed under Title 7A, Section 9-403(3), for the purpose of maintaining the continuity of perfection of the security interest. No tax under Section 619(f) is due at this point. Upon extension at a later time of the date of payment, an amendment to the financing statement must be filed meeting the requirements of Title 7A, Section 9-402(4), to show the extension of the date for payment. At this point tax under Section 619(f) is due upon the entire amount of indebtedness extended as of the date the extension agreement was entered into between the parties.

In cases of this nature, as in many others, the ultimate burden of determination is upon you and you are entitled to require whatever

evidence of the facts you deem necessary. The original security agreement, when considered with other facts, is, in my opinion, sufficient evidence to show whether the parties intended to effect an extension of such maturity date, or are merely maintaining the continuity of a security interest. For evidentiary purposes, and as an aid to the Judges of Probate in administering Section 619(f), a financing statement (UCC-1) when presented for filing should contain on its face (not necessarily in Box 3) the date of maturity shown in the security agreement between the parties.

In conclusion, it is extremely important to emphasize the difference between maintaining the continuity of perfection of a security interest and giving notice for filing tax purposes of the extension of time for payment of an indebtedness. Under the UCC the only way to perfect a security interest, and keep it from lapsing, is to file, first, a financing statement, and then, at the appropriate time or times, a continuation statement or statements. Tax under Section 619(f), *supra*, may or may not be due at the time of filing of such continuation statement or statements. But whenever the parties do effect an extension of time for payment of the indebtedness, it is incumbent upon them (or either of them) to give notice of same, in the appropriate manner (whether, as noted above, by continuation statement, amendment or recordation of agreement itself) so that tax can be paid to the Judge of Probate and also so that the parties may protect themselves against the effect of nonpayment of the tax.

Yours very truly,

WILLIAM J. BAXLEY
Attorney General

May 1, 1972

Hon. Walter P. Crownover
Tuscaloosa County Attorney
Post Office Box 2507
Tuscaloosa, Alabama

Courts—Justices of the Peace—Warrants—Tuscaloosa County.

1. Tuscaloosa County having a court exercising jurisdiction of justices of the peace is expressly prohibited from establishing a court under the provisions of Act No. 2445, Acts 1971.

2. None of the provisions of Act No. 2445 are applicable in counties already having a court exercising justice court powers.

3. An act attempting to authorize a police officer to take complaints or affidavits and issue warrants of arrest is invalid.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your inquiry under date of April 4, 1972, asks the following:

"1. In view of the existence of the County Court of Tuscaloosa, which exercises the jurisdiction formerly exercised by Justice of the Peace, as well as jurisdiction of other matters, may the Tuscaloosa Commission establish a court pursuant to Act 2445?

"2. In the event said commission cannot or decides not to set up a court under the provisions of Act 2445, may it authorize the use of special magistrates as provided by Section 11 of Act No. 2445, to be used in conjunction with the Tuscaloosa County Court?

"3. Aside from the interpretation of the above statutes concerning the permissibility of the special magistrates, whether they operate as special magistrates for a court set up under Act 2445 or a special magistrate for the Tuscaloosa County Court, may they exist at all in view of **Coolidge v. New Hampshire**, 403 U. S. 443, 91 S. C. 2022, 29 L. ed 2d 564, and **Rennow v. State**, 255 So. 2d 602, concerning prosecutors and law enforcement officers serving as magistrates in issuing warrants?"

The court which may be established in lieu of justice of the peace courts under the provisions of Act No. 2445, Acts 1971, approved October 1, 1971, is to be called the "Justice Court of County," and not the "Small Claims Court." Section 1 of Act No. 2445, *supra*.

1. Since Tuscaloosa County has another court (the "Tuscaloosa County Court," Act No. 311, Acts 1965, page 426), and had another court on October 1, 1971, which was created in lieu of justice of the peace courts, or exercising the jurisdiction formerly exercised by justices of the peace, Section 15 of said Act No. 2445 makes the whole act inapplicable to Tuscaloosa County. Therefore, the governing body of Tuscaloosa County is without power to establish a Justice Court of Tuscaloosa County.

2. Since Tuscaloosa County already has a court exercising justice of the peace jurisdiction in both civil and criminal matters, Section 15 of Act No. 2445, *supra*, is applicable, providing that in such event "none of the provisions of this act shall be applicable within such county." It would follow that Section 11 of Act No. 2445, authorizing certain city and county police officers on duty to issue warrants of arrest and search

warrants, would not be applicable in Tuscaloosa County to any court therein, and the county governing body could not authorize special magistrates as provided in Section 11 of Act No. 2445.

3. What has been said above probably answers all of your questions, but in view of the provisions of Section 11 of Act No. 2445, supra, this office should state that in the opinion of the Attorney General, said Section 11 is invalid.

This section provides in part as follows:

"During the hours from 6:00 o'clock P. M. to 7:00 o'clock A. M. on each day of the week, the chief law enforcement officer on duty during these hours, and each chief law enforcement officer on duty of each municipality located in said county, be and are designated for the purpose of issuing warrants of arrest and search warrants,"

I take this to mean that the Legislature intended that such chief law enforcement officer receive sworn complaints or take an affiant's statement in writing, decide probable cause or not, and then issue a warrant if probable cause is found to exist.

It is my view that the chief law enforcement officer on duty could not be removed from duty to ferret out crime and that under the decisions of **Coolidge v. New Hampshire**, 403 U. S. 443, and **Rennow v. State**, 255 So. 2d 602, he could not be expected to be a detached and neutral magistrate, and such warrants would not be valid.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

May 10, 1972

Honorable Clyde M. Steele
City Clerk
City of Bay Minette
Bay Minette, Alabama 36507

Vending Machines—Licenses—Criminal Law.

Coin-operated billiard tables, smaller than regulation size billiard tables are not within the purview of Title 14, Sections 237-258, Code of Alabama 1940.

Opinion by Assistant Attorney General Henry.

Dear Sir:

Your request of February 16, 1972, for an official opinion is as follows:

"I have been requested by the Mayor and City Council of the City of Bay Minette, Alabama, at their last official meeting held February 15th, 1972, to get an opinion from your office on the following subject:

"There is within the corporate limits of the City of Bay Minette, a business known as 'B & B' Game Room. This business has a grill, soft drinks, and coin operated billiard tables. Question: "Is there a statute of State Law that prohibits the operation of the billiard tables of this type on Sundays?"

I have recently received numerous inquiries concerning not only this aspect of coin-operated billiard tables but also the licensing and operation of such devices which are smaller than regulation sized billiard tables. (Regulation sized billiard tables have a playing area of 4½' x 8'4".)

The following is my opinion on the subject:

Coin-operated pool table machines which are smaller than regulation sized pool tables are exempt from the purview to Title 14, Sections 237-258, Code of Alabama 1940, Recompiled 1958. My opinion is grounded on the fact that such machines are smaller than regulation sized pool tables and are partially mechanical in function and design which, in my opinion, was not contemplated by the Legislature as constituting a "pool table" as such term is used in Title 14, Sections 237-258, supra. Such machines more properly fall within the category of a shuffleboard machine, bowling machine or other type vending machine. Therefore, it is further my opinion that a coin-operated pool table which is smaller than regulation sized pool tables should be licensed under Title 51, Section 613, Code of Alabama 1940 Recompiled 1958. There is no State statute which prohibits the operation of coin-operated billiard tables on Sunday.

This opinion applies only to those pool table machines which are coin-operated and which are smaller than regulation sized pool tables.

Any and all prior opinions which are in conflict with this opinion are hereby overruled in those areas wherein said opinions are inconsistent with this opinion.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

June 22, 1972

Honorable Conrad M. Fowler, Chairman
Shelby County Commission
Columbiana, Alabama 35051

Probate Judges—County Commissions—Membership—Expense allowance—Act No. 1747, General Acts 1971, page ____ approved September 17, 1971: Act No. 179, General and Local Acts 1949, page 206, approved July 6, 1949.

Judges of Probate are members of County Commission and shall receive expense allowance same as other members.

Opinion by Assistant Attorney General Lurie.

Dear Judge Fowler:

Your request for opinion dated June 7, 1972, pertaining to expense allowance for members of your County Commission, has been received and considered.

The provisions of Act No. 179, Regular Session 1949, page 206, approved July 6, 1949, in Section 3 states:

"The Board herein created shall consist of a Chairman and four Associate Members, who shall each and severally be chosen and possess the qualifications as hereinafter set out."

The only reasonable and fair conclusion to be considered from such language is that the Chairman is a member of the Board as are the other members described as "Associate Members."

Act No. 1747, Regular Session 1971, approved September 17, 1971, provides in Section 2, as follows:

"In all counties having populations of not less than 36,500 nor more than 39,200, according to the most recent federal decennial census, the members of the board of revenue or other like governing body of the county shall each be entitled to an allowance for expenses in the amount of \$1,200 per annum, which shall be payable in equal monthly installments from the general funds of the county. Such allowance shall be in addition to all other allowances and compensation heretofore provided by law."

Therefore, the Chairman (Probate Judge) as a member of said Board of Revenue or county governing body is entitled to and should be paid the \$1,200.00 per annum expense allowance as is provided in said act.

The opinion of this office to Honorable W. Cecil Johnson, Probate Judge, Clarke County, dated August 28, 1967, is hereby overruled and all subsequent opinions and advices pertinent to the question presented herein are hereby amended, modified or extended to conform to the conclusions expressed herein.

Yours very truly,

WILLIAM J. BAXLEY
Attorney General

I N D E X

QUARTERLY REPORT OF THE ATTORNEY GENERAL FOR THE
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